United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-7327

To be argued by
EDWARD L. SADOWSKY

United States Court of Appeals
SECOND CIRCUIT

DORSEY & CO., INC.,

Plaintiff-Appellant,

against

BANQUE NATIONAL DE LA REPUBLIC D'HAITI,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT—
SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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ARGUMENT

POINT I

Dorsey was not required to mitigate its damages by selling the securities immediately on their return.

In asserting that it had no duty to sell the securities on December 22, 1972 and that the damages attributable to the Banque's negligence should not be so limited, Dorsey cites *Pearlstein* v. *Scudder & German,* 346 F.Supp. 443 (S.D.N.Y. 1972) (Appellant's Brief, p. 6). That decision was reversed and remanded by this Court in Docket Nos. 72-1984 and 72-2001 on December 24, 1975. In reversing, however, this Court has confirmed the reasoning of the district court on which Dorsey relies.

Plaintiff in *Pearlstein* sued for losses sustained in the purchase of securities which the defendant had illegally sold to the plaintiff. This Court agreed with the district court that Pearlstein could not be charged "with any obligation to divine the course of the market at any particular time. Armed with hindsight, we can now characterize the market as obviously declining, but how can we charge Pearlstein with this prescience?" (p. 1274)

The district court had, however, found that Pearlstein first learned that he was the victim of a tort when he consulted a law firm. That court reasoned that Pearlstein was entitled to a reasonable time thereafter within which to mitigate his damages, and measured his damages with reference to that date. 346 F.Supp. 453.

This Court refused "to charge S & G [Scudder & German] with the consequences of what developed to be poor judgment on the part of Pearlstein." (p. 1274) It declined to hold S & G liable for any loss which occurred "after payment for the bonds had been received thus terminating the continuing violation of Regulation T," i.e. the date on which the defendant cured its tortious conduct. (p. 1274)

Here, Dorsey cannot be charged with any obligation to have divined, on December 22, 1972, that the securities were uncollectible. Furthermore, in contrast to Scudder & German in the *Pearlstein* case, the Banque never cured its tortious conduct. Indeed, the affirmative misrepresentation in its cable of December 19, 1972 was never corrected by the Banque until well after the commencement of this litigation.* Dorsey therefore had no duty to mitigate its damages by selling the securities at any time prior to the commencement of this action.

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* The Banque asserts on pages 12 and 30 of its brief that Vedros testified that he knew in late December 1972 or early January 1973 that Supart & Co. did not exist. In fact, Vedros testified that he made an effort to locate Supart & Co. after October 1, 1972

(*footnote continued on following page*)

POINT II

The Banque's negligence was the proximate or legal cause of Dorsey's losses.

The district court found that the Banque acted negligently when it handled the stock certificates and drafts transmitted to it for collection by Dorsey's agent, the Hibernia Bank, and that that negligence was the proximate cause of Dorsey's losses. (11a-12a) The court's conclusion was based on detailed findings of fact, all buttressed by substantial evidence in the record.

The Banque does not argue that it owed no duty to Dorsey, nor that it did not violate that duty. Rather, it asserts that "common sense" requires the conclusion that since Supart & Co. never existed, it cannot be held liable for any failure to deliver to Supart & Co. (Appellee's Brief, pp. 12-13)

A finding of negligence involves "the formulation and then the application of a standard of conduct to evidentiary facts found to be established". *Romero* v. *Garcia & Diaz, Inc.*, 286 F.2d 347, 355 (2d Cir. 1961), *cert. den.* 365 U.S. 869, 81 S. Ct. 905, 5 L.Ed.2d 860 (1961).

And this Court has held "that the district court's determination that a party is liable by reason of negligence 'will

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(*footnote continued from preceding page*)

by making several telephone calls to Miami, Houston and Dallas. The results of those telephone calls were "negative", meaning that it was not listed in the telephone directories of those cities. He also checked with the NASD and the SEC and learned that Supart & Co. was not a stockbroker. However, he never believed that it was a brokerage house or broker, as "[t]hey were not represented to me to be a stockbroker". They were represented "[t]o be a friend and someone that Tomarkin knew who had cleared transactions for him about two years previous to the delivery in September of '72''. (115a-117a)

As a result of his personal investigation, all Vedros knew in late December or early January 1973 was that Supart did not reside in Miami, Houston or Dallas, and that it was not a stockbroker, which he had assumed it was not in the first place.

ordinarily stand unless the lower court manifests an incorrect conception of the applicable law.'" *Erie Lackawanna Railway Co.* v. *Timpany,* 495 F.2d 830, 833 (2d Cir. 1974), quoting *Cleary* v. *United States Lines Co.,* 411 F.2d 1009, 1010 (2d Cir. 1969) (*per curiam*); *Dinnerstein* v. *United States,* 486 F.2d 34, 38 (2d Cir. 1973).

Here, there is no doubt that the trial court applied the proper legal standard to its findings of fact. *Dinnerstein* v. *United States, supra.*

As to the Banque's argument that it is not liable because the drafts were uncollectible, the court found that "[i]t is inescapable that if the Banque had acted with due care and, following instructions, promptly notified the plaintiff [Dorsey] of nonpayment and returned the securities, plaintiff would have been able to either obtain payment from its customers, or, failing that, effect a sale of the securities to mitigate its damages". (11a)

The Banque should bear the loss in the securities value.

POINT III

The actions of Dorsey were not a proximate cause of its losses.

The district court rejected the "defendant's contention that if the plaintiff had used due care throughout its dealings with the accounts in question, and had not violated [various] rules and regulations . . ., it never would have opened the two accounts and never would have sent the drafts and stock certificates to the defendant Banque for collection—or, put another way, that plaintiff, through its own negligence, set in motion a series of events which, in any event, could only have resulted in a return of the certificates and unpaid drafts. *This defense must fail; it amounts to no more than an argument that if the transaction had never taken place there would have been no damages and no loss.*" (10a) (emphasis added)

Indeed, as the court found, Dorsey, on behalf of its customers, Whitkind and Tomarkin, had previously presented securities for payment which it had purchased for these customers: "[t]he only difference between those six or seven transactions and the instant transaction was that the drafts in the prior transactions were drawn upon and presented for payment to a drawee in Montreal, Canada. In each of those transactions payment was made in due course. The plaintiff's successful experience in the Canadian transactions justified it in accepting its customers' instructions in the instant transaction." (11a)

At the trial and now in its brief, the Banque has attempted to, as characterized by the district court, "expand its defense by claiming that the alleged violations of rules and regulations are an absolute bar to plaintiff's claim, regardless of whether they were a proximate cause of plaintiff's loss." (13a)

This argument is apparently based on the testimony of plaintiff's "expert" Victor Pierre-Louis, Esq. who the district court found "voluble but far from impressive, and considering that he was counsel for defendant Banque, to whom he had previously given an opinion exonerating it from liability, he can hardly be considered an objective witness." (9a)

The district court properly rejected the Banque's unjustified expansion of its defense for two reasons:

> "1. The defendant has not pointed to any case in which any such defense was asserted by a third party. Nor has it offered any support for dispensing with the requriement of showing proximate cause as a part of any such defense. Indeed, the existence of such a requirement has support. Irving Weis & Co. v. Offenberger, 31 Misc.2d 628, 220 N.Y.S.2d 1001 (Mun. Ct. 1961); E. F. Hutton & Co. v. Weinberg, [1961-64 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91,332 (N.Y. Sup. Ct. 1964). Dispensing with the requirement

would also run counter to the requirement of showing proximate cause as part of an affirmative action for damages for alleged violations of the securities laws. *See* VI Loss, Securities Regulation 3880-83 (1969); V Loss, *supra,* at 3301, 3307-08, III Loss, *supra,* at 1759 (1961)." (13a Footnote 5); and

2. "[*T*]*he defendant's failure to plead this as an affirmative defense bars its consideration by the court.*" (13a) (emphasis added) "Fed. R. Civ. P. 8(c); *see* Trio Process Corp. v. L. Goldstein's Sons, Inc., 461 F.2d 66, 74 (3d Cir.), *cert. denied,* 409 U.S. 997 (1972); Radio Corp. of America v. Radio Station KYFM, Inc., 424 F.2d 14, 17 (10th Cir. 1970); Roe v. Sears, Roebuck & Co., 132 F.2d 829, 832 (7th Cir. 1943); United States v. Commercial Union Ins. Group, 294 F. Supp. 768, 772 (S.D.N.Y. 1969)." (13a-14a, Footnote 6)

But despite the court's rejection of the Banque's plea of contributory negligence, the Banque again attempts to obscure its own negligence by spotlighting Dorsey's actions. Certainly, as the district court reasoned,

"[i]t was this negligence on the Banque's part, not any alleged negligence of the plaintiff [Dorsey] that was the proximate or legal cause of the losses plaintiff seeks to recover. *Assuming that plaintiff was negligent, such negligence could have been a proximate cause only of any loss representing the decrease in value in the securities from the time of their purchase to the time when they would have been returned by the Banque had it acted with due care, but plaintiff does not seek to recover this portion of its loss.*" (12a) (emphasis added)

Dorsey was the victim of frauds perpetrated by its own customers and by the Banque. It had no inkling of either

fraud, and was not negligent in failing to act as though it knew the truth.

Dorsey's actions were not a "legal cause" of its damages, and do not preclude its recovery.

POINT IV

The Banque is liable for Dorsey's damages.

The district court found that the law of Haiti governed on the issue of liability. (7a-8a) It made no finding as to the law of Haiti regarding damages, or whether the Haitian rule was applicable. However, Article 1169 of the Haitian Civil Code, on which the district court relied, in part, contains the tort measure of damages which is appropriate for this case: "Everyone is liable for the prejudice he has caused. . . ." (8a)

In its brief, the Banque claims that certain passages of the Code Napoleon and the Haitian Civil Code which pertain to *contract* rules, are controlling. (Appellee's Brief, p. 27.)

First, the law of Haiti with regard to damages is a fact which must be proved and as to which expert testimony, as well as other relevant documents and other material, may be received in evidence. *Banco Nacional de Cuba* v. *Sabbatino,* 27 F.R.D. 255 (S.D.N.Y. 1961).

The sections quoted by the Banque are not in the record of the proceedings below, nor have they been proven as facts.

Furthermore, contract rules of damages are irrelevant, as there was no contract between Dorsey and the Banque. Yet, even if the instructions in the drafts and collection letters be construed as contract terms, the Banque's failure to follow those instructions, and, indeed, its affirmative misleading of Dorsey, require the conclusion that all of the

damages which Dorsey suffered were the foreseeable outcome of the Banque's breach.

Dorsey's damages should not be limited to the loss in value of the stocks from October 2, 1972 to and including December 22, 1972.

Dorsey's "last contact" with the Banque—the cable of December 19, 1972—indicated that Supart & Co. existed, and if Dorsey would return the securities the Banque would make renewed efforts at collection. It was "foreseeable" that Dorsey would not sell out, although "it could have". (Appellee's Brief, pp. 28-29.) (19a)

Dorsey's contract was with its customers and, acting as their agent, it suspected no reason to act in haste to sell out. Any continued negotiations Dorsey had with Whitkind and Tomarkin following December 22, 1972 were in the context of the Banque's misrepresentation.

POINT V

The Banque is not entitled to damages for wrongful attachment.

In its answer the Banque counterclaimed based upon Dorsey's order of attachment, and that counterclaim was dismissed "upon the merits" in the district court's decision. (14a)

If the Banque is now reasserting its counterclaim for wrongful attachment, it is faced with a record barren of evidence that the Haitian Post Office was in any way responsible for the alleged non-receipt of the summons and complaint. (Appellee's Brief, p. 32)

Furthermore, no cause of action arises for wrongful attachment until "the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property." N.Y. Civ. Prac. Law and Rules § 6212(b) (McKinney 1963).

This means that the Banque has no right to proceed against the undertaking until such time as it is finally determined that Dorsey was not entitled to attach its property or when a judgment is entered in its favor. Since Dorsey prevailed below, the Banque must wait until the outcome of this appeal. And, unless it is found that it was not liable to Dorsey, it has no cause of action for wrongful attachment. 7A Weinstein, Korn & Miller New York Civil Practice, ¶ 6212.12.

CONCLUSION

Dorsey was not required to mitigate its damages by selling the securities immediately upon their return, and is entitled to judgment of $294,962.31.

Respectfully submitted,

TENZER, GREENBLATT, FALLON & KAPLAN,
Attorneys for Appellant

EDWARD L. SADOWSKY
MONA D. SHAPIRO
Of Counsel

UNITED STATES COURT OF APPEALS
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AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Juan Delgado, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 596 Riverside Drive, New York, N.Y.
That on January 16, 1976, he served 2 copies of Appellant's Reply Brief
on

LUNNEY & CROCCO, Esqs.,
20 Exchange Place,
New York, New York

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Juan Delgado

Sworn to before me this
16th day of January, 1976

Charles J. Esposito

CHARLES J. ESPOSITO
Notary Public, State of New York
No. 30-1132025
Qualified in Nassau County
Commission Expires March 30, 1977